ABDUL RAZAK DATUK ABU SAMAH *a*

v.

SHAH ALAM PROPERTIES SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR *b*
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEALS NOS: W-03-41-98 & W-03-43-98]
5 APRIL 1999 *c*

CONTRACT: *Damages - Assessment - Contract set aside - Measure of damages - Whether on footing of breach of contract - Whether on basis of rescission of contract - Whether s. 74 of Contracts Act 1950 applicable - Expenditure reasonably incurred in consequence of fraudulent misrepresentation* *d*

CONTRACT: *Misrepresentation - Fraudulent misrepresentation - Voidability - Rescission - Damages - Assessment - Placing innocent party in the position as though there was no reliance on fraudulent misrepresentation*

CONTRACT: *Breach - Condition - Repudiation - Obligations de futuro - Damages - Whether innocent party can have contract set aside - Distinction between rescission ab initio and repudiation - Whether repudiatory breach brings about rescission ab initio* *e*

The plaintiff purchaser claimed that he had entered into a sale and purchase agreement with the defendant vendor in respect of an apartment building based on the defendant's fraudulent misrepresentation. The High Court dismissed the claim but on appeal the Federal Court set aside the agreement and ordered the defendant to, *inter alia*, refund the purchase price with interest thereon and pay damages to be assessed by the High Court. The senior assistant registrar assessed damages at: (i) RM46,000 for loss of value of appreciation of the property; (ii) RM5,999 for loss of value of appreciation of the club membership of the property; (iii) RM142,240.22 being interest paid by the plaintiff to the bank ('the said interest'); (iv) RM72,790.10 being interest at 8% pa on the said interest; and (v) RM5,500 for a valuation report on the property. The plaintiff's claim for loss of rent which he alleged he would have received had the transaction been completed was disallowed. Both parties appealed against the SAR's decision but the judge in chambers dismissed them. Before the Court of Appeal herein, the issue which arose for decision was: what measure of damages was the plaintiff entitled to recover consequent upon obtaining a decree of rescission of the agreement he had with the defendant? *f* *g* *h* *i*

Held:

Per Gopal Sri Ram JCA

[1] What the Federal Court ordered was a rescission of the contract on the basis of fraudulent misrepresentation. Therefore, the assessment of damages should **not** be on the basis of a breach of contract, which would be to put the plaintiff in the position as though the contract had been performed, **but** on the basis that the contract had been rescinded, which would place the plaintiff in the position he would have been had he not been induced by the fraudulent misrepresentation. Hence, the plaintiff was only entitled to recover expenditure reasonably incurred in consequence of the fraudulent misrepresentation, whether before or after the rescission.

[2] Consequently, items (i) and (ii) and the claim for loss of rent were not recoverable as they amounted to damages for breach of contract. Items (iii) and (iv) were recoverable as they constituted expenditure reasonably incurred in consequence of the fraudulent misrepresentation. Item (v) was an expense related to the proof of damages in contract; it was not a reasonable expense and thus irrecoverable.

[Plaintiff's appeal dismissed; defendant's appeal allowed in part.]

Case(s) referred to:

Annie Yeo v. Senanayake [1963] MLJ 43 ***(not foll)***
Archer v. Brown [1985] 1 QB 401 ***(refd)***
Bowes v. Chaleyer (1923) 32 CLR 159 ***(refd)***
Car & Universal Finance Co Ltd v. Caldwell [1961] 1 QB 525 ***(refd)***
Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 ***(refd)***
Demetrios v. Gikas Dry Cleaning Industries Pty Ltd (1991) 22 NSWLR 561 ***(foll)***
Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd [1965] 1 WLR 623 ***(refd)***
Holmes v. Jones (1907) 4 CLR 1692 ***(foll)***
Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha [1962] 2 QB 26 ***(refd)***
Johnson v. Agnew [1980] AC 367 ***(foll)***
Moschi v. Lep Air Services Ltd [1973] AC 331 ***(refd)***
Oscar Chess Ltd v. Williams [1957] 1 WLR 370 ***(refd)***
Sellars v. Adelaide Petroleum NL (1994) 179 CLR 332 ***(foll)***
Senanayake v. Annie Yeo [1965] 2 MLJ 241 ***(dist)***

Legislation referred to:

Contracts Act 1950, ss. 19(1), (2), 74

Civil Appeal No: W-03-41-98
Appellant in person
For the respondent - Zainur Zakaria; M/s Zainur Zakaria & Co

Civil Appeal No: W-03-43-98
For the appellant - Zainur Zakaria; M/s Zainur Zakaria & Co
Respondent in person

Reported by Anne Khoo

JUDGMENT

Gopal Sri Ram JCA:

Introduction

There are two appeals before us. The appellant in Civil Appeal No W-03-41-98 ("the first appeal") was the plaintiff in the court below. The respondent to the first appeal was the defendant. In Civil Appeal No. W-03-43-98 ("the second appeal") the roles are reversed. It is the defendant in the court below who is the appellant while the plaintiff is the respondent. We heard both appeals on 26 October 1998. Since both appeals arise from the same action and concern a common issue, we heard them together. The parties agreed to this course. At the conclusion of argument, we reserved judgment. We also directed parties to put in written submissions. This was done. We find it convenient throughout this judgment to refer to the parties according to the title assigned to them in the court below.

We said that both appeals raise a common issue. It has to do with the measure of damages that the defendant is liable to pay the plaintiff. In the first appeal, the plaintiff complains that he has received too little; in the second appeal, the defendant complains that it has been ordered to pay too much. The question at issue is simple enough. It is amply covered by settled authority. Yet, a brief reference to the factual matrix against which these appeals rest is necessary to properly appreciate the arguments raised before us.

Background

The litigation that has led to these appeals has a long and chequered history. On 26 May 1986, the plaintiff, who was then a serving judge of the High Court in Malaya, issued a writ against the defendant. His statement of claim reveals that he had, on 25 May 1982, entered into an agreement with the defendant, a developer, to purchase an apartment for RM236,000. The purchase price had been paid in full from loans disbursed to the plaintiff by two institutional lenders. Interest had been paid on these loans. The plaintiff complained that he had been induced to enter into the agreement in question on the basis of a false and fraudulent representation made by the defendant in its brochure. He claimed that in consequence thereof, he had lost the value of his investment. He particularised them in his statement of claim. The

amount came to RM299,661.32. This sum was made up of the purchase price, the interest he had paid and some incidental expenses. At the foot of his pleaded case, he claimed the following relief:

(1) Rescission of the agreement of the 25th of May, 1982;

(2) The sum of RM299,661.32;

(3) Interest from the date of writ to the date of realisation;

(4) Damages;

(5) Such further or other relief; and

(6) Costs.

The defendant delivered a defence in which it traversed all points of importance raised by plaintiff in his statement of claim. A reply was then delivered by the plaintiff.

In due course the plaintiff's action came on for hearing before the High Court which dismissed it. The plaintiff appealed. The Federal Court allowed his appeal on 24 November 1995. Although it made several orders, we are only concerned with the following:

(1) that the agreement dated 25 May 1982 be set aside;

(2) that the sum of RM299,661.32 be refunded by the defendant to the plaintiff together with interest thereon at 8% per annum from 26 May 1986 until the date of full realisation;

(3) that the defendant do pay the plaintiff damages to be assessed by the High Court.

We pause to observe that although before us the plaintiff who appeared in person challenged the Bahasa Malaysia version of the first order, it is plain from his written submission tendered before the learned judge in the court below (at p. 33 of the Record in the first appeal) that he accepts that what the Federal Court ordered was rescission of the agreement in question.

On 24 February 1997, the defendant paid over to the plaintiff a sum of RM556,072.89, made up of the judgment sum of RM299,661.32 and interest on that sum which amounted to RM256,411.57.

Pursuant to the last paragraph of the Federal Court's order, the High Court proceeded to assess the damages allegedly suffered by the plaintiff. The assessment was conducted by the senior assistant registrar before whom the plaintiff claimed a number of items which he said he was entitled to recover

from the defendant, including loss of rent that he might have earned from the apartment. The senior assistant registrar then assessed the following damages in the plaintiff's favour:

(1) RM46,000.00 for the loss of the value of the appreciation of the subject property, representing the difference between the purchase price and the market value at the date of the Federal Court's decision.

(2) RM5,999.00 for the loss of value of the appreciation of the club membership representing the difference between the purchase price and the market value of the club membership at the date of the Federal Court's decision, together with interest at 8% from April 24, 1985.

(3) RM143,240.22 being the interest paid by the plaintiff to The Hongkong and Shanghai Banking Corporation Limited since May 1986 to April, 1997.

(4) RM72,790.10 being interest at 8% per annum on each of the monthly interest payments made by the plaintiff to The Hongkong and Shanghai Banking Corporation Limited from the date of payment in May 1986 to April 30, 1997 and continuing up to the date of judgment.

(5) RM5,500 being the cost of the valuation report prepared by C. H. Williams Talhar & Wong.

The senior assistant registrar did not, however, allow the claim for the loss of rent which the plaintiff said he would have received if the transaction had proceeded to completion.

Both the defendant and the plaintiff appealed against the senior assistant registrar's decision to the judge in chambers who dismissed both appeals. It is against those orders of dismissal that the present appeals have been brought.

The Issue

We have at the outset identified the sole question that lies at the heart of these appeals. We will now reformulate it. The question is this. What measure of damages is the plaintiff entitled to recover consequent upon obtaining a decree of rescission of the agreement that he had with the defendant?

In order to deal with and resolve this issue it is necessary to advert to some of the relevant principles that govern the subject at hand. And we apprehend that much of the confusion in these appeals has arisen because of a failure to properly appreciate the terminology that is often employed in that area of the law of contract with which we are concerned in the present appeals. We therefore consider it desirable to re-state some of the fundamental principles.

The Law

Having regard to the relevant provisions of the Contracts Act 1950 and the authorities upon the subject, we consider the following propositions to be settled and beyond argument.

1. Since the consequences for a statement made by a party to a contract depends upon the stage at which the statement is made, the law recognises a division between contractual and pre-contractual statements.

2. Pre contractual statements are called "representations". However, contractual statements are obligations actually undertaken by the party making them. They are referred to by lawyers as "the terms of a contract".

3. Whether a particular statement made in the course of negotiations leading to the making of a contract is a representation or a term depends upon the intention of the parties and is to be deduced from the totality of the evidence. While decided cases suggest differing approaches, it is clear that no single criterion is conclusive. See, for example, *Oscar Chess Ltd. v. Williams* [1957] 1 WLR 370; *Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.* [1965] 1 WLR 623.

4. The traditional method of classifying the terms of a contract is according to the degree of their importance. Stipulations that are essential are called "conditions", while those of a secondary nature are referred to as "warranties". The breach of a condition entitles the innocent party to repudiate the contract, that is, to treat it as at an end as to future obligations, and to sue for damages. On the other hand, the breach of a warranty sounds only in damages. Whether a particular term is a condition or a warranty is a matter of judicial impression, ie, it is a question of law. See, *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287; [1996] 3 MLJ 675.

5. An alternative method of classification of the terms of a contract is according to, not their relative importance, but the consequences of their breach. This approach is especially useful in cases of synallagmatic contracts. Under the alternative method, if the breach of a particular term goes to the root of the contract so as to affect its very substratum, then, the remedy of the innocent party lies in repudiation and damages. However, if its breach produces lesser consequences, the remedy of the innocent party lies in damages only. See, *Bowes v. Chaleyer* [1923] 32 CLR 159; *Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha* [1962] 2 QB 26.

6. The courses open to an innocent party in a case where there is a breach of an essential term of the contract does not include a right to have the contract set aside and to return to the *status quo ante*. Any termination by the innocent party only has effect upon the performance of future obligations.

7. The right of an innocent party to put an end to future obligations under a contract is sometimes referred to as "the right to rescind" and the act of termination as "rescission". This terminology is erroneous and misleading. True rescission is specific relief. It is available to a litigant either as self-help upon satisfaction of certain conditions (see, *Car & Universal Finance Co. Ltd. v. Caldwell* [1961] 1 QB 525) or as a judicial remedy obtainable in an action. It was invented by the Court of Chancery and now finds its place in Chapter IV of our Specific Relief Act 1950. It has the effect of setting at naught the contract *ab initio* and not merely as to obligations *de futuro*. It places the parties on a footing as though a contract had never been made. The difference between the so-called "rescission" which is in truth nothing more than the act of terminating future obligations under a contract and rescission in its true sense is brought out in the following passage in the speech of Lord Wilberforce in *Johnson v. Agnew* [1980] AC 367, at p. 392:

> At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as 'rescinding' the contract, this so-called 'rescission' is quite different from rescission *ab initio*, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about 'rescission *ab initio*'.

So much for contractual statements that become incorporated into a contract.

8. Pre-contractual statements or representations are divided into either:

   (a) representations that do not induce the making of a contract which are called "mere representations"; or

   (b) representations that induce the making of a contract.

The former are not ordinarily actionable because the law treats them as purely harmless. The latter type may however give rise to liability.

9. Representations that do in fact induce the making of a contract fall into three categories, namely:

   (a) representations that amount to collateral contracts;

   (b) misrepresentations; and

   (c) statements that give rise to an estoppel against the maker.

10. Misrepresentations in turn are of three types, depending upon the state of mind of the maker. That state of mind may be fraudulent, negligent or innocent, in the sense that it is truly free of any blameworthiness or inadvertence. The existence of a particular state of mind on the part of the representor determines, in the absence of acquiescence, the range of remedies available to the representee.

11. Fraudulent or negligent misrepresentation renders a contract voidable at the instance of the representee. See, Contracts Act 1950, s. 19(1). The representee is therefore entitled to apply to a court for a decree of rescission from a court and also to an award of damages. See, *Archer v. Brown* [1985] 1 QB 401. Damages are available in addition to rescission because an action for fraudulent misrepresentation is grounded upon the tort of deceit, and in the case of negligent misrepresentation upon the tort of negligence.

The contrary view expressed by the Court of Appeal of Singapore in *Annie Yeo v. Senanayake* [1963] MLJ 43 does not, in our opinion, represent the law. In that case, Rose CJ, said:

> We were referred by learned counsel for the defendant to Mr Snell's little book on *Equity* which is often useful in that it sets out briefly the effect of the authorities. In the 25th Ed at page 569, I think it was, it is stated that a person who rescinds his contract is entitled to be restored to the position he would have been in had the contract not been made; and his property must be returned and so on. **No damages are recoverable since the purpose of damages is to place the party recovering them in the same position, so far as money can do it, as he would have been in had the contract been carried out.** It stands to reason in the present case that there would have been great difficulty in assessing what the damages would be. If you begin to assess the damages in a case where a person thinks he has got a good investment and finds that he has a bad one, the assessment must be a very hit and miss affair. It seems to me in the circumstances of this case that in view of the shortness of time which elapsed between the purchase of the shares and the resiling from the transaction, the appropriate remedy is for the parties to be restored to the same position that they were in before the plaintiff purchased the shares upon the false representation of the defendant. (emphasis added.)

When the case reached the Privy Council (*sub nom Senanayake v. Annie Yeo* [1965] 2 MLJ 241), counsel for the respondent/plaintiff informed the Board that he proposed to argue the appeal on the footing that there had been only an innocent misrepresentation for which rescission may be had. The Judicial Committee accordingly confined itself only with the questions whether the circumstances relied upon by the appellant/defendant made *restitutio in integrum* substantially impossible and whether rescission was timely and just and fair. Consequently, the point under present discussion became moot.

12. An innocent representation – one that is neither fraudulent nor negligent – entitles the representee to merely rescission, although, in certain cases (not relevant for present purposes) he may also obtain an indemnity. He may not however have damages. It is also important to recognise that relief by way of an indemnity is not made on the same footing as damages.

13. An action for rescission may be met by any of the equitable defences available against claims for other forms of specific relief, eg, a plea of affirmation or of laches or a plea that damages are an adequate remedy. Rescission may also be refused by a court on the ground that *restitutio in integrum* is not possible because, eg, an innocent third party's rights have intervened in the interim.

14. Where damages are awarded for fraudulent misrepresentation – and we consider the principle to be the same to a case of negligent misrepresentation – the assessment of damages must take into account any sum recovered as restitution under the claim for rescission so as to prevent double recovery. Damages for fraud are awarded on the basis that the innocent representee is put, so far as money can do so, in the position which he would have occupied had there been no reliance on the fraudulent inducement. See, *Holmes v. Jones* [1907] 4 CLR 1692, at p. 1709; *Demetrios v. Gikas Dry Cleaning Industries Pty. Ltd.* [1991] 22 NSWLR 561, at p. 575; *Sellars v. Adelaide Petroleum NL* [1994] 179 CLR 332. The assessment of damages would therefore include all expenditure incurred reasonably and properly in consequence of and flowing directly from the deceit, whether before or after the date of the rescission. It may, where appropriate, include exemplary and aggravated damages. See *Archer v. Brown (ibid)*.

15. The assessment of damages in an action for breach of contract rests upon a basis that is materially different from one that is founded upon fraud. In the former, the duty of the guilty party to perform the primary obligations under the particular contract is by implication of law

substituted with a duty to pay damages *in lieu* of such performance, although, in assessing those damages, the court must have regard to the terms of the contract in order to ascertain the performance promised in it, including performance which would have fallen due after the date of the discharge. See, *Moschi v. Lep Air Services Ltd.* [1973] AC 331. The object of damages for breach of contract is to place the innocent party in the same position as though the contract had been performed. But, in an action for fraudulent misrepresentation, the object of the law is to place the representee in the position he would have been had he not been induced. Hence, the rule as to remoteness of damage contained in s. 74 of the Contracts Act 1950 has no application whatsoever to an action for damages in the tort of deceit.

16. A representee who is the victim of a fraud may, at his election, abandon his right to rescind and may instead insist that the contract be performed and that he be put in the position in which he would have been if the representations made had been true. See, Contracts Act 1950, s. 19(2).

With that we now turn to consider the application of the relevant principles to the appeals before us.

The Present Appeals

The rival contentions of the parties before us are directed at the approach that is to be adopted in the assessment of damages pursuant to the order of the Federal Court. The plaintiff contends that damages should be assessed upon a contractual basis, ie, on the footing that the defendant had breached the bargain that had been struck.

Encik Zainur Zakaria, of counsel for the defendant however submits that it is an error in principle to approach the assessment of damages in the present on the footing of a breach of contract because the agreement of 25 May 1982 has been set aside by the Federal Court and the plaintiff has received reimbursement of all sums specified in the order of that Court. He argues that damages should be assessed on the footing that the contract had been rescinded.

After careful reflection we find ourselves persuaded by these arguments of Encik Zainur.

Although the Federal Court gave no written reasons, it is plain that it found for the plaintiff on the basis of his pleaded case that there had been a fraudulent misrepresentation. That is why it granted rescission, set aside the contract and restored the plaintiff to his original position. Had the Federal Court found for the plaintiff on the basis that there had been a breach of

contract, it would have refused rescission (as that is not the appropriate remedy) and merely directed an assessment of damages. Since the damages awarded to the plaintiff were in addition to the remedy of rescission, the basis of compensation set out in the first and second limbs of s. 74 of the Contracts Act 1950 has no application to the present instance. The plaintiff is therefore only entitled to recover all expenditure reasonably and properly incurred in consequence of and flowing directly from the fraudulent misrepresentation, whether before or after the date of the rescission.

That brings us to the heads of damage assessed by the senior assistant registrar.

As to items (1) and (2), these are irrecoverable as they are losses suffered in consequence of a breach of contract which is not the case in the present instance. However, the reimbursement of interest paid by the plaintiff under items (3) and (4) constitute expenditure which the plaintiff reasonably and properly incurred in consequence of the defendant's fraudulent misrepresentation. They are therefore recoverable by the plaintiff. They total RM216,030.32. Item (5) is an expense related to the proof of damages in contract. It is not a reasonable expense and is therefore not recoverable. The plaintiff's claim for loss of rent which forms the subject matter of the first appeal is equally irrecoverable since it amounts to damages for breach of contract.

In the circumstances, we would dismiss the first appeal. We would however allow the second appeal in part and vary the order of the High Court by reducing the award of damages to RM216,030.32. This sum shall carry interest at 8% per annum from the date of the order of the senior assistant registrar until the date of realisation.

Now for costs. The plaintiff will pay the costs of the first appeal to the defendant. Since the second appeal succeeds in part, we order the plaintiff to pay the defendant one third the taxed costs of the second appeal. The deposit lodged in the first appeal shall be paid out to the defendant to account of its taxed costs. The deposit lodged in the second appeal is refunded to the defendant. The orders for costs made in the court below are affirmed.